

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 568 of 2000****For Approval and Signature:****HON'BLE MR.JUSTICE J.M.PANCHAL****AND****HON'BLE MR.JUSTICE H.B.ANTANI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not?
 - 3 Whether their Lordships wish to see the fair copy of the judgment?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?
 - 5 Whether it is to be circulated to the civil judge?
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GOPILAL SHRIRAMJI JAT - Appellant

Versus

STATE OF GUJARAT - Respondent

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Appearance :

MR. I.M. KAPOOR FOR RAJESH M. AGRAWAL for Appellant.
MS. HANSA PUNANI, A.P.P. for Respondent.

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CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL

and

HON'BLE MR.JUSTICE H.B.ANTANI

Date : 03/08/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

1. Instant appeal, filed under Section 374 (2) of the Code of Criminal Procedure ("*the Code*", for short), is

directed against judgment dated June 25, 2000, rendered by the learned Additional Sessions Judge, Anand, in Special Sessions Case No. 3 of 1999, by which the appellant is convicted under Section 18 of the Narcotics Drugs and Psychotropic Substances Act, 1985 ("*the Act*", for short) and sentenced to suffer R.I. for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default, S.I. for 1 year.

2. The facts emerging from the record of the case are as under:

In November 1998, Mr. R.D. Chaudhary, was discharging duties as Circle Police Inspector, Anand. On November 12, 1998, he was present in Vidhyanagar Police Station. He received an information that the appellant was possessing and selling *opium* in his house, i.e. Bungalow No. 52, situated in Karnavati Society, Anand. On receipt of information, necessary entry in the Register maintained at Vidhyanagar Police Station was made by him. He, thereafter, requisitioned services of two *panch-witnesses* and arranged a raid. The first part of *panchnama* was drawn at the Police Station itself. Mr.Chaudhary, thereafter, in the company of other police personnel and *panch-witnesses*, proceeded towards the

house of the appellant. On reaching the house of the appellant, he found that the appellant was present. He made the appellant aware about the information received by him and informed him that it was necessary to search his house. Presuming that the provisions of Section 50 of the Act were applicable to the facts of instant case, he offered the appellant to search his house in presence of a Gazetted Officer or a Magistrate. The appellant expressed his desire that the search be carried out in presence of a Gazetted Officer. Therefore, Circle Police Inspector Mr. Chaudhary, despatched one Head Constable, Hira, to inform the Divisional Police Officer and request him to come to the house of the appellant. Accordingly, Head Constable, Hira, informed the Divisional Police Officer, Anand. Mr. R. M. Parmar, who was then Divisional Police Officer, Anand, arrived at the house of the appellant. Thereafter, the house of the appellant was searched. From the building itself, nothing incriminating was found. However, it was noticed that the house had an *adala* i.e. a place where buffaloes are being tethered. On search of the *adala*, a pillow was found, which was open from one side. It was noticed that the pillow was stuffed with cotton. On taking out cotton from the pillow, three plastic bags were found, containing semi-liquid substance like *opium*. On further

search of the pillow, a pillow-cover was found, containing: 9 Currency Notes each of Rs. 500/- denomination, 195 Currency Notes each of Rs. 100/- denomination, and 280 Currency Notes each of Rs. 10/- denomination. The search of kitchen of the house resulted into a find of a balance-scales with measures of weight. The substance found in the plastic bags was *prima facie* ascertained to be *opium* by smelling. It was necessary to ascertain weight of the substance found in each of the three plastic bags. Therefore, Goldsmith, Jayantibhai Bhailalbai Soni, was summoned. He weighed the substance found in the three plastic-bags, the total weight of which was 370 gms. The plastic-bags were, thereafter, tied with twine and placed in a cloth bag, wherein slips bearing signatures of *panch-witnesses* were placed. On the cloth bag, official stamps of the Divisional Police Officer, Anand and the Vidhyanagar Police Station were applied. Thereafter, the cloth bag was sealed. Circle Police Inspector Mr. Chaudhary, demanded from the appellant any document authorising him to possess and sell the *opium*. However, the appellant could not produce the same. He was, therefore, arrested. The second part of *panchnama* indicating search and seizure of contraband item was drawn, which was signed by the two *panch-witnesses*; the Divisional Police Officer;

Circle Police Inspector Mr. Chaudhary; the appellant as well as his wife. As commission of offence punishable under the Act was disclosed, Circle Police Inspector Mr. Chaudhary, lodged his complaint before the Divisional Police Officer. The Divisional Police Officer forwarded the complaint, the *panchnama*, the *muddamal*, etc. to P.S.O. Of Vidhyanagar Police Station. On the basis of the complaint of Mr. Chaudhary, offence punishable under the Act was registered against the appellant. Further investigation in this case was made by Mr. K.H. Desai, who was then Police Sub-Inspector of Vidhyanagar Police Station. The *muddamal* seized was sent to F.S.L. for analysis. The report of the analysis indicated that the substances analysed were *opium* within the meaning of the Act.

3. On completion of investigation, the appellant was charge-sheeted in the Court of learned Special Judge, Anand, on the basis of which, Special Sessions Case No. 3 of 1999 was registered. The learned Additional Sessions Judge, Anand, to whom the case was made over for trial, framed necessary charge against the appellant at Exh. 6. It was read over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined - (1) *panch*, Dhanabhai

Somabhai as P.W. 1, at Exh. 9; (2) *panch*, Jayantibhai Dhanjibhai as P.W. 2, at Exh. 13; (3) Police S.O., Raijibhai Punambhai as P.W. 3 at Exh. 14; (4) Soni Jayantibhai Bhailalbai as P.W. 4, at Exh. 18; (5) Circle Police Inspector, Mr. Ramsinhhbai Dasrathbhai Chaudhary as P.W. 5, at Exh. 19; (6) Divisional Police Officer, Mr. Ramabhai Manabhai Parmar as P.W. 6, at Exh. 22; and (7) Investigating Officer, Mr. Karamsinh Harjibhai Desai as P.W. 7 at Exh. 23, to prove its case against the appellant. The prosecution also produced documentary evidence such as, the slips bearing signatures of the *panch-witnesses* on three samples at Exhs. 10, 11 and 12 respectively; the entry made in the Register maintained at Vidhyanagar Police Station after receipt of information at Exh. 16; the entry indicating receipt of the *muddamal*; the complaint lodged by Circle Police Inspector Mr. Chaudhary, against the appellant, etc. at Exh. 15; the *panchnama* indicating search of house and *adala*, belonging to the appellant as well as find and seizure of contraband item at Exh. 21; necessary intimation sent by Circle Police Inspector, Anand, to P.S.O. Vidhyanagar at Exh. 24; the report of analysis at Exh. 28; the certificate of analysis at Exh. 29, etc., in support of its case against the appellant.

4. After recording of evidence of prosecution-witnesses was over, the learned Judge explained to the appellant, the circumstances appearing against him in the evidence of prosecution-witnesses and recorded his further statement, as required by Section 313 of the Code. In his further statement, the claim advanced by the appellant was that he was innocent and that a false case was foisted upon him. However, no defence evidence was led by him.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved beyond reasonable doubt that the appellant was found in possession of *opium* weighing 370 gms without pass or permit on November 12, 1998 with scales and weights as well as cash of Rs. 28,500/- and committed offences punishable under Section 18 of the Act. The learned Judge noticed that no breach of provisions of Section 42 (2) of the Act was committed by Mr. Chaudhary, before searching the house of the appellant. The plea raised by the appellant that he was not in possession of the house from which the offending substance was found, was negatived by the learned Judge of the trial Court on the basis of testimony of police officials and contents of copy of Assessment Register of the year 1998-99, relating

to the house of the appellant. The learned Judge further found that the *muddamal* was kept in safe custody at Vidhyanagar Police Station and reached intact to F.S.L. for analysis. The learned Judge further noticed that the *mudammal* analysed was *opium* within the meaning of the Act. In view of abovereferredto conclusions, the learned Judge has convicted the appellant under Section 18 of the Act and imposed sentence referred to earlier by judgment dated June 5, 2000, giving rise to instant appeal.

6. Mr. I. M. Kapoor, learned Counsel appearing for Mr. R. M. Agrawal, learned Advocate of the appellant, contended that the information, received by Circle Police Inspector Mr. Chaudhary that the appellant was in possession and selling *opium* in his house, was not reduced into writing, and as there was breach of provisions of Section 41 (2) and / or Section 42 (1) of the Act, the conviction of the appellant should be set aside. It was argued that no report was forwarded by Circle Police Inspector Mr. Chaudhary, to his immediate official superior, as contemplated by Section 42 (2) of the Act and, therefore, the judgment impugned in the Appeal should be reversed for non-compliance of mandatory provisions of the Act. According to the learned Counsel of the appellant, P. W. 4, Soni Jayantibhai Bhailalbhair,

who is not declared hostile, has stated in his testimony that he was called for weighing the *muddamal* at 9.30 P.M. on November 12, 1998, whereas the evidence adduced by police officials indicates that the raid was carried out and everything, including drawing of second part of *panchnama*, was over before 7.15 P.M., and in view of this glaring discrepancy, the appellant should be acquitted by holding that the house of the appellant was never raided at 4.30 P.M., as claimed by Circle Police Inspector, Mr.Chaudhary. The learned Counsel emphasised that no reliable evidence is adduced by the prosecution to establish that the appellant was in exclusive possession of Bungalow No. 52, situated in Karnavati Society, Anand, and as the *adala* of the said Bungalow was open as well as accessible to all, the learned Judge should have disbelieved the case of the prosecution that the appellant was found in possession of *opium*. Elaborating this point, it was contended that the evidence on record would show that there are other members in the family of the appellant and as the appellant was not in exclusive possession of the house, his unwarranted conviction should be set aside, more particularly, when other evidence like Ration Card, etc. was not obtained by the Investigating Officer. It was argued that the testimony of P.S.O., Raijibhai, indicates that he had handed-over

the *muddamal* for safe custody to one Mooljibhai, whereas receipt issued by F.S.L. indicates that the *muddamal* was received from Mehboob Mian, as a result of which, the trial Court should have held that the *muddamal* samples was not kept in safe custody, and tampering with the samples was not ruled out, more particularly when neither Mooljibhai nor Mehboob Mian was examined by the prosecution. According to the learned Counsel of the appellant, the whole evidence relating to custody and safe keeping of the *muddamal* is neither complete nor satisfactory, and as it is not established by the prosecution that, what F.S.L. received was the *muddamal* seized during search of house of the appellant, the appeal should be accepted. The learned Counsel further emphasised that neither Circle Police Inspector Mr.Chaudhary, nor Divisional Police Officer Mr. Parmar nor Investigating Officer Mr.Desai, has stated in their respective testimony that the seal, bearing impression of "P.S.I. V.V. Nagar", was used while sealing the *muddamal* and, therefore, the possibility of tampering with the *muddamal* should be viewed in the light of this deficiency obtaining in the case of the prosecution. The learned Counsel asserted that the learned Judge of the Trial Court has failed to appreciate the evidence on record in its true perspective and, therefore, the appeal should be

allowed.

7. Ms. Hansa Punani, learned Additional Public Prosecutor appearing for the State, contended that not only Circle Police Inspector Mr. Chaudhary, has stated that on receipt of information, the house belonging to the appellant was searched at about 4.30 PM, but other witnesses such as Divisional Police Officer Mr. Parmar, and Investigating Officer, Mr. Desai, have also stated that the house of the appellant was searched at about 4.30 P.M.; and as this assertion of the police officers stands corroborated by contemporary document, namely, the *panchnama* of seizure of contraband item produced at Exh. 21 and the complaint lodged by Circle Police Inspector, Mr.Chaudhary, which is produced at Exh. 20, the plea that the house of the appellant was not searched at about 4.30 P.M., based on the testimony of Soni Jayantibhai Bhailalbai, should not be accepted by the Court. According to the learned Counsel of the State Government, the evidence on record clinchingly establishes that the house of the appellant was searched by Circle Police Inspector, Mr.Chaudhary, in presence of Divisional Police Officer Mr. Parmar, and other police officials as well as *panch-witnesses* at about 4.30 P.M. on November 12, 1998 and the search had resulted into find of contraband item,

as a result of which, the claim advanced by the learned Counsel of the appellant that the house of the appellant was not searched at 4.30 P.M. should be rejected outright. What was stressed was that Circle Police Inspector Mr. Chaudhary, is a Gazetted Officer, who is empowered by appropriate notification of the State Government issued under Section 41 (2) of the Act and, therefore, it was not necessary for him to comply with the provisions of sub-section 2 of Section 42 of the Act. The learned Counsel of the State Government extensively referred to the entry made in the Register maintained at the Vidhyanagar Police Station to highlight the point that the information received was reduced into writing and pleaded that it is wrong to contend that the information received was not reduced into writing by Circle Police Inspector Mr. Chaudhary. The learned Counsel further referred to the testimony of witnesses examined by the prosecution as well as contents of certificate and contents of the copy of Assessment Register produced at Exh. 31 to point out and argued that it is satisfactorily established by the prosecution that the appellant was in possession of the house which was searched on November 12, 1998 by Circle Police Inspector Mr. Chaudhary and others. The learned Counsel contended that it is not claimed by the appellant, in his further

statement recorded under Section 313 of the Code, that he was not in possession of house, which was searched on November 12, 1998 or that the *adala* from where the offending substance was found was accessible to one and all, and, therefore, the plea raised by the learned Counsel of the appellant that the appellant was not in exclusive possession of the house searched on November 12, 1998 or that the *adala* was accessible to one and all and, therefore, the criminal liability could not have been fastened on the appellant, should not be accepted by the Court. Dealing with the point regarding safe custody of the *muddamal*, it was argued that soon after search and seizure, the *muddamal* was handed-over for safe custody to P.S.O., Rajibhai, of Vidhyanagar Police Station, who in turn had handed-over the same to Mooljibhai, and as the record indicates that after preparing forwarding letter dated November 12, 1998, the *muddamal* was sent to F.S.L. on November 13, 1998, it would be too far-fetched to hold that there was possibility of tampering with the *muddamal*. According to the learned Counsel of the State Government, the report of the F.S.L. indicates that the *muddamal* was found to be properly sealed and intact, which in turn, rules out the possibility of tampering and, therefore, the plea that the *muddamal* was not kept in safe custody or that the possibility of tampering with

the same was not ruled out, should be rejected by the Court. The learned Counsel of the State Government asserted that cogent and convincing reasons have been assigned by the learned Judge of the Trial Court, who had advantage of observing demeanour of the witnesses for convicting the appellant under Section 18 of the Act, and as the learned Counsel of the appellant has failed to dislodge those weighty reasons, the appeal which lacks merits, should be dismissed.

8. This Court has heard Mr. I. M. Kapoor, learned Counsel of the appellant, and Ms. Hansa Punani, learned Additional Public Prosecutor, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. The plea that information received by Circle Police Inspector Mr. Chaudhary, was not reduced into writing by him, as required by Section 41 (2) and / or Section 42 (2) of the Act and, therefore, the judgment impugned in the appeal should be reversed, has no substance. From the testimony of Circle Police Inspector, Mr. Chaudhary, recorded at Exh. 19, it is evident that he had received

the information between 3.30 P.M. to 3.40 P.M., when he was present at Vidhyanagar Police Station. In paragraph-2 of his testimony, he has claimed that on receipt of information, necessary entry was made in the Register maintained at Vidhyanagar Police Station. The extract of the entry is produced by him at Exh. 15. It is also stated by him that on receipt of information, he had requisitioned the services of two *panch-witnesses* and drawn the first part of the *panchnama* at the Police Station itself. A bare glance at the entry and the introductory part of the *panchnama* makes it clear that information received by him was reduced into writing and reflected in those documents.

Neither the procedure nor method nor mode of reducing the information into writing is prescribed either under Section 41 or Section 42 of the Act. In **Abdul Salam Yusufbhai Shaikh Vs. State of Gujarat, 2003 (2) GLR 1643**, the information was received by Police Inspector, Narcotics Cell that one person, named Abdul Rehman Yusufbhai Shaikh, resident of Jumma Masjid, Navsari, was selling *charas*. That information was not reduced into writing either in the Station Diary or in the Register, which was being kept and maintained for taking down such information. The Police Inspector, in

his deposition, did not state that he had reduced the information into writing, but mentioned that on receipt of information, he had informed about that in writing to the Deputy Superintendent of Police, Narcotics Cell. It was also further found in the said case that a report under Section 42 (2) of the Act was made by the Police Inspector to his immediate official superior, wherein information received was mentioned. This was construed by the Division Bench of this Court to mean that the information received by the Police Inspector was reduced into writing, because no procedure, method or mode of reducing the information into writing is prescribed either under Section 41 or Section 42 of the Act.

Again, in **Criminal Appeal No. 640 of 1998** filed by **Abdul Sattar Mehbood and Another Vs. State of Gujarat** decided on July 14, 2005 and July 15, 2005, it was argued that the prosecution must fail, as information received by Deputy Superintendent of Police, A.T.S., that three persons were dealing in *charas* near building of AbdulGani, situated in Sarkivad, Shahpur, Ahmedabad, was not reduced into writing. The evidence in the said case indicated that soon after the receipt of information, two *panch-witnesses* were summoned and first part of the *panchnama* was drawn wherein the information received was

mentioned. The Division Bench has held that mention of information in the *panchnama*, which was prepared immediately on receipt of information, was sufficient to establish that the information received was reduced into writing.

Applying the principle laid down in the decisions quoted above to the facts of instant case, this Court finds that the reflection of information received in entry made in Register maintained at the Police Station and the *panchnama* is sufficient compliance of the provisions of Section 41 (2) and / or 42 (1) of the Act, which requires that the information received should be received into writing. Therefore, the appellant is not entitled to any benefit on the ground that the provisions of Section 41 (2) and / or 42 (1) of the Act are not complied with.

10. The contention that the Circle Police Inspector failed to report to his immediate officials superior, as contemplated by Section 42 (2) of the Act and, therefore, the prosecution must fail, is devoid of merits. It is relevant to notice that Circle Police Inspector Mr.Chaudhary, whose testimony is recorded at Exh. 19, is a Gazetted Officer. By notification No. GHL-14.NDS.1082-

10577(i)-M dated 15th June, 1987, the Government of Gujarat, in exercise of its powers under sub-section 2 of Section 41 of the Narcotics Drugs And Psychotropics substances Act, 1985, has empowered for the purpose of sub-section 2 of Section 41, all the officers of the Police Department of and above the rank of Inspector of Police, posted in any part of Gujarat and other officers of the Prohibition, Excise Department, Drugs, Cosmetics Departments, etc. From the contents of the said notification, it is evident that the officers of the rank of Police Inspector and above can exercise the power under sub-section (2) of Section 41 of the Act.

In **Kamlesh Parmanand Gangwar Vs. State of Gujarat, 1999 (3) GLR 2119**, the Division Bench of this Court, has construed the provisions of Section 42 of the Act and held that the requirement of Section 42 (2) of the Act would be necessary to be met with only when the officer making the entry, search, seizure or arrest is an officer falling under Section 42 (1) of the N.D.P.S. Act, but where an officer falling under the category of Section 41 (2) of the N.D.P.S. Act carries out the entry, search, seizure or arrest, the requirement of Section 42 (2) would not be necessary to be met with.

In **M. Prabhulal Vs. Assistant Director, Directorate of Revenue Intelligence, (2003) 8 SCC 449**, the Supreme Court has also construed the provisions of Section 42 (2) and 41 (2) of the Act and held that Section 42 (2) of the Act would not be applicable when search, seizure, etc. is conducted by a Gazetted Officer under Sections 41 (2) and (3) of the Act. The Supreme Court has explained that Section 41 (2) enables the Central Government or the State Government, as the case may be, to empower an officer of a Gazetted rank, who can either himself act or authorise his subordinate on the terms stated in the Section. What is ruled by the Supreme Court is that, under sub-section (1) of Section 42, however, there is no restriction on the Central Government or the State Government to empower only a Gazetted Officer, but on an officer empowered under sub-section (1) of Section 42, there are additional checks and balances, as provided in the *proviso* and also provided in sub-section (2) of Section 42. The Supreme Court has laid down authoritatively that it is clear from the language of sub-section (2) of Section 42 that it applies to the officer contemplated by sub-section (1) thereof and not to a Gazetted Officer contemplated by sub-section (2) of Section 41 when such a Gazetted Officer himself makes an arrest or conducts search and seizure.

Coming to the facts of the case on hand, this Court finds that the powers of entry, search, seizure, arrest, etc were exercised by Circle Police Inspector, Mr.Chaudhary, who is a Gazetted Officer and, therefore, in terms of principle laid down by the Supreme Court in the above quoted decision, he was not required to submit report to his immediate official superior, as contemplated by sub-section (2) of Section 42 of the Act. Therefore, the appellant is not entitled to acquittal on the ground that the mandatory provisions of sub-section (2) of Section 42 of the Act were not complied with by Mr. Chaudhary.

11. The plea that the testimony of Soni Jayantibhai Bhailalbai recorded at Exh. 13 shows that he was called for weighing the *muddamal* at 9.30 PM on November 12, 1998 and, therefore, the case of the prosecution that raid was carried out at the residence of the appellant at about 4.30 P.M. should be disbelieved and the appellant should be acquitted, is merely stated to be rejected. As noticed earlier, the information was received by Circle Police Inspector Mr. Chaudhary between 3.30 P.M. and 3.45 P.M. when he was present at Vidhyanagar Police Station. On receipt of the information, necessary entry about the

same was made in the Register at 4.00 P.M. on November 12, 1998. It is also mentioned therein that on receipt of the information, A.S.I., Mr. J. N. Mahida as well as two *panch-witnesses* were summoned and that arrangement was made to search the premises of the appellant along with Police Sub-Inspector, Mr. K. H. Desai, as well as Police Sub-Inspector, Mr. V.J. Jadeja. The testimony of Mr. Chaudhary further shows that the members of the raid-party had reached the house of the appellant at about 4.30 P.M. and after reaching the house of the appellant, he had informed the appellant about information received by him. It is also clear from his testimony that he had offered the appellant that his house could be searched in presence of a Gazetted Officer, if so desired by him, and as the appellant had expressed desire that his house be searched in presence of a Gazetted Officer, Circle Police Inspector Mr. Chaudhary, had requested his immediate officer superior Mr. Parmar, to remain present at the house of the appellant. This testimony of Mr. Chaudhary establishes that the house of the appellant was searched by him at about 4.30 P.M. in presence of his official superior. The testimony of Mr. Parmar, who was then Divisional Police Officer, Anand, shows that he had reached the house of the appellant within no time as soon as the information was received by him that search of the

house of the appellant was to be made in his presence. Though the *panch-witnesses* have not fully supported the prosecution-case, their testimony also indicates that the search of the house of the appellant was made at about 4.30 PM. The fact that search of the house of the appellant was made at about 4.30 P.M. is also mentioned in contemporary document, *panchnama*, which was drawn on November 12, 1998 between 1600 Hours to 1815 Hours.

Viewed in the light of the reliable evidence adduced by the prosecution, indicating that the search of the house of the appellant was made at about 4.30 P.M. on November 12, 1998, this Court is of the opinion that the solitary statement made by witness, Soni Jayantibhai Bhailalbai, in his testimony that he had gone to the house of the appellant at about 9.30 P.M. on November 12, 1998 for weighing the *muddamal*, loses all its significance. A fair reading of the testimony of witness, Jayantibhai, makes it evident that in order to oblige the defence, he has accepted certain suggestions made to him during the course of his cross-examination. On the basis of stray sentences appearing in the testimony of witness, Jayantibhai, it would not be correct and prudent to come to the conclusion that premises of the appellant was not searched at 4.30 P.M.,

but was searched at 9.30 P.M., as was claimed by witness, Jayantibhai. Therefore, the appellant is not entitled to any benefit on the ground that his premises was not searched at about 4.30 P.M., but was searched at 9.30 P.M., as claimed by witness, Jayantibhai.

12. The contention that the appellant was not in exclusive possession of the house, which was searched or that the *adala* was accessible to one and all, and as prosecution has failed to establish that he was in exclusive possession of the house, his conviction should be set aside, is devoid of merits. It is relevant to notice that at the time when the search was carried out, the appellant was found physically present in the house. The prosecution has produced a copy of Assessment Register relating to the year 1998-99, which indicates that property, bearing No. 3525 situated in Karnavati Society, Anand, belongs to the appellant and that the appellant was in possession of the same. Except making substanceless suggestions, which have been denied by all the witnesses, no evidence is produced by the appellant on the record of the case to establish that he was not in possession of the house, which was searched by Circle Police Inspector Mr. Chaudhary, in presence of the Divisional Police Officer, Anand, or that the *adala* is

accessible to one and all. As noticed earlier, after recording of evidence of prosecution-witnesses was over, the circumstances appearing against the appellant were explained to him by the learned Judge and his further statement was recorded, as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, it was never claimed by the appellant that he was not in possession of the house, which was searched by Circle Police Inspector Mr. Chaudhary or that the *adala*, forming part of his house was accessible to one and all. The evidence on record and more particularly, that of witness, Mr. Chaudhary, would indicate that the *adala* was bounded on three sides by wall and there was one gate for egress and ingress of cattle. The evidence on record clinchingly establishes that the appellant was in conscious possession of contraband articles.

In **Madan Lal And Another Vs. State of H.P., (2003) 7 SCC 465** and **Megh Singh Vs. State of Punjab, (2003) 8 SCC 666**, the Supreme Court has examined the concept of "possession" with reference to the provisions of N.D.P.S. Act. According to the Supreme Court, the expression, "possession" is a polymorphous term, which assumes different colours in different contexts and it may carry different meanings in contextual different backgrounds.

After holding that the word, "conscious" meant awareness about a particular fact and is a state of mind, which is deliberate, it is ruled that once possession is established, the person who claims that it was not a "conscious possession", has to establish it, because how he came to be in possession, is within his special knowledge. The Supreme Court has noticed that Section 35 of the Act gives a statutory recognition to this possession because of presumption available in law. According to the Supreme Court, similar is the position in terms of Section 54 of the Act.

In the light of the principles laid down by the Supreme Court in above quoted decisions and the factual scenario of the present case, this Court is of the opinion that not only possession but conscious possession of the offending article has been established by the prosecution. Therefore, the plea that the appellant was not in exclusive possession of the house, which was searched or that the *adala* from where the offending articles were found was accessible to one and all and, therefore, the appellant is entitled to be acquitted, cannot be upheld.

13. However, the point whether the *muddamal* seized was

the same, which was forwarded to F.S.L. for analysis, deserves consideration. Circle Police Inspector Mr. Chaudhary, whose testimony is recorded at Exh. 19, has stated that after ascertaining the weight of the *opium* kept in the plastic-bags, the open portion of each of the plastic-bag was tied with twine and the three plastic-bags were kept in a cloth bag. The Circle Police Inspector has further stated that slips bearing signatures of *panch-witnesses* were kept in the cloth bag and stamps of Divisional Police Officer, Anand, as well as that of Vidhyanagar Police Station, were applied after which the cloth bag was sealed. Mr. Chaudhary, in his testimony, has not stated as to which seal was applied on the cloth bag while sealing the same. The F.S.L. Report, produced on record of the case at Exh. 28, shows that cloth bag had seal bearing inscription of "P.S.I. V.V.Nagar". Therefore, the first deficiency, which this Court finds, is that which seal was applied for sealing cloth bag is neither stated by Circle Police Inspector Mr. Chaudhary nor by any of the witnesses nor the said fact is mentioned either in the *panchnama* or in the complaint or in any other document produced by the prosecution. Further, as noticed earlier, the open portion of each of the three plastic bags was tied with a twine, but not closed, by resorting to heating device,

etc. Even the slips bearing the signatures of the *panch-witnesses* were not pasted on any of the three plastic-bags, but were kept loose in the cloth bag.

The proper procedure of packing and sealing contraband item, seized under the provisions of N.D.P.S. Act, has been stated in **Criminal Appeal No. 287 of 1999** filed by **Ganpatram Punmaram Vishnoi Vs. State of Gujarat**, decided on May 7, 2002 by Division Bench, comprising Kshitij R. Vyas and Ravi R. Tripathi, JJ., wherein it is emphasised that in order to rule out the possibility of tampering with the *muddamal* at a later stage, the slips containing signatures of *panch-witnesses* as well as the Investigating Officers should be affixed on the articles seized and, thereafter, the seal should be applied over it so that in case any attempt for tampering with the articles seized is made, the seal would be broken or the seal would be torn, which would immediately reveal such an attempt. Thus, the sealing procedure resorted to by Circle Police Inspector Mr. Chaudhary is defective.

The above noticed deficiency has to be viewed in the light of absence of evidence adduced by the prosecution as to how the *muddamal* was dealt with after it was handed-over by Circle Police Inspector Mr. Chaudhary, to

P.S.O. Rajibhai of Vidhyanagar Police Station. The testimony of P.S.O. Rajibhai recorded at Exh. 14 would show that after he was handed-over the *muddamal* and other articles by Circle Police Inspector Mr. Chaudhary, he had handed-over the *muddamal* to one Mooljibhai. That Mooljibhai is not examined by the prosecution. The receipt issued by F.S.L. for having received the *muddamal*, which is produced on the record of the case at Exh. 26, would indicate that the *muddamal* was received from a Constable, named, Mehboobhai, having buckle No. 206. This Mehboobhai is also not examined by the prosecution. Thus, no satisfactory evidence is adduced by the prosecution to establish that the *muddamal* was kept in safe custody after it was handed over by P.S.O. Rajibhai to Mooljibhai. As observed earlier, the slips bearing signatures of *panch-witnesses* were never affixed on any of the three plastic bags, but were kept loose in the cloth bag. The seal applied on the cloth bag could have been removed at any point of time and seal having inscription of "P.S.I. V.V. Nagar" could have been used at any point of time, as the same was available at V. V. Nagar Police Station. Further, the open portion of none of the three plastic bags was closed by means of resorting to any device. Thus, the possibility of tampering with the *muddamal* articles is not ruled out at

all, benefit of which should go to the appellant. The reasonable doubt that muddamal seized was not properly sealed and not kept in safe custody arises from the facts on record of the case and will have to be accorded to the appellant. The appeal will have, therefore, to be accepted.

14. For the foregoing reasons, the appeal succeeds. Judgment dated June 5, 2000 rendered by the learned Additional Sessions Judge, Anand, in Special Sessions Case No. 3 of 1999, convicting the appellant under Section 18 of the N.D.P.S. Act and sentencing him to R.I. for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default S.I. for one year, is hereby set aside. Instead, the appellant is acquitted. The respondent shall set the appellant at liberty forthwith unless his presence is needed in jail with reference to any other case. The *muddamal* be disposed of in terms of the directions issued by the learned Judge of the trial Court in the impugned judgment.

[J. M. PANCHAL, J.] [H. B. ANTANI, J.]

/shamnath